United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2130

B
P/S

To be argued by
EDWARD M. CHIKOFSKY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-2130

JOE STEVENSON SADDLER,

Appellant,

-against-

UNITED STATES OF AMERICA

Respondent.

Appeal from the United States District
Court for the Eastern District of New York

BRIEF FOR APPELLANT

EDWARD M. CHIKOFSKY
Attorney for Appellant
300 Park Avenue
New York, N. Y. 10022
(212)593-9000

1

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED — PAGE

CASES CITED — PAGE

STATUTES CITED

Miscellaneous Authority Cited

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2130

JOE STEVENSON SADDLER,

Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR APPELLANT

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

The appellant, Joe Stevenson Saddler, appeals pursuant to Title 28, United States Code, Section 2255 from an order of the United States District Court for the Eastern District of New York, entered on December 20, 1974, by Hon. Mark A. Costantino, U.S.D.J., which denied, without a hearing, appellant's motion to vacate sentence, pursuant to 28 U.S.C. §2255. The decision of Judge Costantino has not been reported and is reproduced at Exhibit 3 of the Appendix to this brief. On October 8, 1975, this Court granted appellant's motion for leave to appeal in forma pauperis and the assignment of counsel.

Questions Presented

1. Did the District Court err in accepting a guilty plea from appellant without making further inquiry into his mental state, where substantial evidence was presented as to appellant's psychiatric difficulties and narcotics addiction, and where counsel specifically requested a psychiatric examination?
2. Did the District Court err in failing to hold an evidentiary hearing or in failing to order a psychiatric examination of appellant in the §2255 proceeding below, where the Government specifically moved for such an examination and where the appellant raised substantial factual issues not refuted by the files and records of the case?
3. If the Court answers either of the above questions in the affirmative, should the guilty plea be vacated rather than attempting a retrospective determination of competency?

Proceedings Below

On December 14, 1972, appellant was convicted in the United States District Court for the Eastern District of New York (Costantino, D.J.) upon his plea of guilty to the crime of bank robbery, in violation of Title 18, United States Code, Section 2113(a), and was sentenced on February 16, 1973 to serve a term of imprisonment not to exceed twelve (12) years, pursuant to Title 18, United States Code, Section 4208(a)(2).

No appeal was taken at that time.

On April 3, 1974, appellant filed a pro se motion to vacate sentence in the United States District Court for the Eastern District of New York (Costantino, D.J.). (Exhibit 6, Appendix). Counsel was assigned by the District Court, and a Memorandum in Support of the Petition was filed by counsel on June 21, 1974. (Exhibit 7, Appendix).

On August 5, 1974, the Government filed a motion for an order directing a psychiatric examination of appellant by the Board of Examiners at the Federal Penitentiary in Atlanta, Georgia, pursuant to Title 18, United States Code, Section 4241, in order to determine appellant's present mental condition and competency, as well as his competency at the time of his guilty plea and sentence. (Exhibit 8, Appendix).

The Government's answering papers were filed on September 25, 1974, (Exhibit 11, Appendix) and Judge Costantino's memorandum and order, which denied the petition on the merits, as well as the Government's motion for a psychiatric examination, was filed on December 20, 1974. Appellant filed a notice of appeal to this Court on December 27, 1974.

Statement of Facts

On June 10, 1972, appellant, a twenty-four year old high school graduate with a significant history of mental illness, suicide attempts, and drug abuse, was arrested in connection with an armed robbery of a branch of Manufacturers Hanover Trust Company, located at 84 Broadway, Brooklyn, New York, on June 7, 1972. On June 20, 1972, a three-count indictment was filed in the Eastern District of New York (72 Cr. 718) charging

appellant and three codefendants with conspiracy (18 U.S.C. §371) and substantive violations of 18 U.S.C. §2113(a) and (d), arising out of the aforementioned robbery.

Initially, appellant pleaded not guilty. However, on December 14, 1972, after a suppression hearing had been held, and a jury had been selected, David McCarthy of the Legal Aid Society, appellant's assigned counsel, announced to the Court that his client desired to plead guilty.

In the course of the plea proceedings, the Court advised the appellant of the constitutional rights he was waiving by pleading guilty (380-382)* and advised him as to the maximum sentence which could be imposed on the charge (386). The District Judge, however, made only perfunctory inquiry into whether the plea was the product of force, coercion, or promises (383), and attempted in only cursory fashion to elicit from appellant the factual particulars of the crime charged (383-386). Moreover, when addressing appellant, the District Judge never specifically explained to him the nature and specific elements of the charge to which he was pleading.**

Following this brief colloquy, the District Judge found, in response to specific inquiry by the Assistant United States Attorney, that there was a proper factual basis for the plea and

---

* [Plea Minutes, Exhibit 4, Appendix]

** Conceded below (Government's Memorandum in Opposition, p. 6, Exhibit 11, Appendix).

that it was made voluntarily, with an understanding of the nature and consequences of the plea (387).

Upon the acceptance of the plea, appellant's counsel informed the Court of the need for a competency examination:

> THE COURT: The Court accepts the plea.
>
> MR. McCARTHY: Thank you, Judge.
>
> One further thing: In aid of sentence, your Honor, I would request, and in view of the nature of the charge, the defendant's drug background, I would ask that your Honor consider providing for a 4244 examination, your Honor.
>
> THE COURT: Yes, a narcotic appraisal, --
>
> MR. McCARTHY: Both narcotic and psychiatric, just so that we can have a very clear record when the defendant is sentenced and also I think it would be in aid of the sentencing procedure.
>
> THE COURT: I have no objection to it. It's one of the reasons why we have the section, so I will permit that.
>
> MR. McCARTHY: Thank you very much, your Honor.
>
> THE COURT: You must order it, and so on.
>
> MR. McCARTHY: I will draw up the order.
>
> THE COURT: I have no objection to it. I will permit it.
>
> MR. McCARTHY: Thank you, your Honor.
>
> (389-390)

Inexplicably, no psychiatric examination was ever conducted.

Shortly after the plea proceedings, new counsel from the Legal Aid Society was substituted in place of appellant's attorney, who had initially requested the competency examination, and, apparently, no order for examination was ever submitted to the District Court. In all likelihood, the failure of counsel to submit an order would appear to be the result of administrative inadvertance, occasioned by substitution of counsel, rather than by any specific waiver of the examination.

In any event, on February 16, 1973, the date of sentencing, appellant was represented by Edward Kelly of the Legal Aid Society, who immediately brought appellant's psychiatric difficulties to the District Court's attention, requesting that sentencing be deferred pending a psychiatric evaluation:

> MR. KELLY: Your Honor, even before I met Mr. Saddler the first time this morning -- as you recall, this case was handled by David McCarthy of our office -- even before I met him and read the probation report, it was my evaluation of the defendant's background, that the Court would only be in the best position to sentence him if he were given a 4208(b) commitment.
>
> * * * *
>
> This defendant has in his background, a history of attempts at suicide.

I have a letter from the Knickerbocker Hospital, at which Mr. Saddler was treated. They indicate that he has some very grave emotional problems that stem from his childhood. He also has the problem of drug addiction.

I attempted to talk to Mr. Saddler this morning, to introduce myself, and he did not respond at all, and spoke in an incoherent way.

I think the Court would be in the best position to properly impose sentence on this defendant, if a study were made of this defendant's background, his emotional problems, his narcotics addiction under 4208(b), and I would therefore move for that relief at this time.

THE COURT: I really don't agree with you. I don't think he's a candidate for 4208(b). I think he should be given a jail sentence, and if they want to examine him in jail and send him to an institution, let them do it.

* * * *

[Sentence Minutes, 3-4, Exhibit 5, Appendix]

Thereupon, having implicitly rejected counsel's offer of proof as to appellant's psychiatric background and suicide attempts, as well as the documentation of psychiatric hospitalizations and narcotics addiction contained in the presentence report,

the District Judge proceeded to engage the appellant in the following confusing colloquy, in the course of imposing sentence:

> THE COURT: I don't follow that at all. What has he got to say on behalf of himself? Does he have anything to say?
>
> * * * *
>
> THE DEFENDANT: What it look like?
>
> THE COURT: You want to say --
>
> THE DEFENDANT: What it look like? I here.
>
> THE COURT: No, this Court is ready for sentencing then. Not under 4208(b).
>
> All right, the Court passes sentence on this defendant: 12 years, 4208(a) (2).
>
> THE DEFENDANT: My attorney?
>
> THE MARSHAL: Yes.
>
> THE COURT: With a recommendation that if they should find he needs mental assistance, they can give it to him in prison.
>
> * * * *
>
> [4-5]

In the §2255 proceeding below, the Government specifically moved for an order of psychiatric examination, pursuant to 18 U.S.C. §4241, in order to retrospectively determine appellant's competency at the time of plea and sentence. The District Judge denied this request.

Thus, despite the District Court's initial acquiescence, the unanimous requests of appellant's respective counsel at both plea and sentence, and the Government's request in the proceeding below, appellant has never been given a psychiatric examination in order to ascertain his competency.

ARGUMENT

POINT I

THE DISTRICT COURT FAILED TO MAKE SUFFICIENT INQUIRY INTO THE VOLUNTARINESS OF APPELLANT'S GUILTY PLEA WHERE SUBSTANTIAL EVIDENCE WAS PRESENTED AS TO APPELLANT'S PSYCHIATRIC DIFFICULTIES AND NARCOTICS ADDICTION, AND WHERE COUNSEL SPECIFICALLY REQUESTED PSYCHIATRIC EXAMINATION

A. The District Judge Failed to Make Sufficient Inquiry into the Voluntariness of the Guilty Plea to Comply with Rule 11, Fed. R. Crim. P.

The District Court's failure to make further inquiry into the voluntariness of appellant's guilty plea, where it had been put on notice as to appellant's significant history of mental illness, suicide attempts and drug abuse, was error, plain on the face of the record, warranting vacatur of the plea. Rule 11, Federal Rules of Criminal Procedure; 18 U.S.C. §4244.

It is axiomatic that a defendant who enters a guilty plea simultaneously waives significant constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. In order for this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458 (1938). "Consequently, if a defendant's guilty plea is not

equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." McCarthy v. United States, 394 U.S. 459, 466 (1969).

A plea which is the tainted product of ignorance, incomprehension, coercion, terror, inducements, threats, or promises is void as it cannot be said to be a knowing, free and rational choice of alternatives open to an accused and cannot be an intelligent waiver of constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Sanders v. United States, 373 U.S. 1, 19 (1963); Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927).

It is fundamental that no part of a plea or trial may be had against a defendant who is mentally incompetent, and any such resulting conviction is a violation of due process. 18 U.S.C. §4244; Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, 350 U.S. 961 (1956).

The oft-cited test of incompetence to stand trial is the standard mandated in Dusky v. United States, supra, 362 U.S. as 402:

> [T]he test must be whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him. Id.

In effectuating the standard enunciated in Dusky, Pate v. Robinson, supra, places an affirmative obligation on the trial court to make its own inquiry into the competency of the accused by requiring that the trial court hold a hearing any time there is sufficient evidence, from any source, to raise a "bona fide" doubt as to the accused's competency to stand trial.

Similarly, Rule 11 imposes an obligation to make inquiry of the accused in order to rule out threats, coercion and plea bargaining as improper motivations for the plea and to establish the accused's awareness of the rights he will forfeit and the maximum sentence to which he may be subjected. Such factors are essential to a finding of the voluntary character of the plea.

Mental competence is yet another factor that the trial court must consider. If the court is not convinced of the accused's competency, there are appropriate procedures for resolving such doubts by psychological evaluation. 18 U.S.C. §4244. Malinauskas v. United States, 505 F.2d 649, 655 (5th Cir. 1974).

It is manifest that, when the mental condition of the accused is called into serious question, the scope of judicial inquiry must necessarily go beyond the minimal requirements of Rule 11. The Rule "requires something more than conclusionary questions phrased in the language of the rule. It contemplates such an inquiry as will develop the underlying facts from which the court will draw its own conclusions." United States v. Kincaid, 362 F.2d 939, 941 (4th Cir. 1966).

Plainly, where mental illness is suggested by the record, the District Court has a two-pronged obligation imposed both by Rule 11, Fed. R. Crim. P., and Pate v. Robinson, supra.

First, as to the possible incompetency of a defendant, the District Court has an obligation to satisfy itself as to the mental state of the accused, even absent any objection by counsel. Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974).

Second, to ensure the voluntariness of the guilty plea, the customary inquiry mandated by Rule 11, Fed. R. Crim. P., must be more elaborate in the face of colorable claims of mental illness than in the case of the average defendant in order to establish a proper factual finding that the accused's waiver of his rights was knowing, intelligent and voluntary.

The usual plea colloquy is generally inadequate in properly ascertaining a defendant's mental state:

> While such an inquiry, insofar as it is meant to probe the defendant's intention and understanding, might properly be concerned with his actual state of mind, it usually consists instead primarily of the determination that no external factors existed which could have unfairly influenced the guilty plea decision. Although the court is obliged to ask whether the defendant understands the charges and the consequences of pleading guilty, to explain them if he does not, and to inquire whether he has been subjected to threats or coercion, the court may accept his answers to these questions if they indicate an absence of coercion or undue influence; the defendant does not have to demonstrate his comprehension. Furthermore, in the ordinary case no inquiry into the defendant's mental capacity to make the plea is required -- he is presumed sane. Commentators agree that this

> colloquy is neither designed for nor adequate for ascertaining mental incompetence.
>
> Note, Competence to Plead Guilty: A New Standard, 1974 Duke L.J. 149, 158-159
>
> (Emphasis in original)

Certainly, the federal courts have long recognized that, where the waiver of constitutional rights is concerned, the trial court has a significant responsibility to scrutinize the mental state of a defendant waiving such rights, even absent a claim of mental incompetency.

In Westbrook v. Arizona, 384 U.S. 150 (1966), the Supreme Court suggested that a defendant's competence to stand trial did not, in and of itself, establish his competence to waive his right to counsel and to represent himself. Hence, it determined that special inquiry must be made to assess the validity of that waiver. See also United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

Relying upon Westbrook v. Arizona, supra, the Ninth Circuit, in Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), held that, even though a defendant may in fact be competent to stand trial, he may not be sufficiently competent to plead guilty. The Sieling court went on to state that neither the petitioner's pre-trial competency hearing nor the colloquy conducted before entry of his guilty plea sufficiently established his competency to make the "reasoned choice" which the court deemed essential to the validity of the guilty plea and the waiver of constitutional rights entailed in such a plea.

The Sieling Court adopted the standard first formulated by Judge Hufstedler in her dissent in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir.), cert. denied, 400 U.S. 834 (1970):

> A defendant is not competent to plead guilty if mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea. Id.

Similarly, in the case of In Re Williams, 165 F. Supp. 879, 881 (D.D.C. 1958), the District Court held that, "The issues involved in the plea of guilty and the consequences which attach to a plea require a greater degree of awareness than the competency to stand trial." See also McCoy v. United States, 363 F.2d 306, 307 n.3 (D.C. Cir. 1966).

In relying upon the Westbrook rationale, Judge Bazelon, in United States v. David, 511 F.2d 355, 362 n.19 (D.C. Cir. 1975), held the trial court's finding of competency to stand trial insufficient, in and of itself, to establish that the defendant had made a knowing and voluntary waiver of his right to a jury trial. Although agreeing that the defendant's level of awareness and comprehension may have been high enough to render him competent to stand trial, the Court concluded that it may not have been high enough to allow him to waive his constitutional right to a trial by jury or that it may have called for a more detailed explanation by the trial court of the nature of that right. See In Re Williams, supra; Drope v. Missouri, supra, 420 U.S. at 182.

Furthermore, this Circuit has itself mandated detailed inquiry into a defendant's mental state even absent a claim of incompetency in circumstances where there was serious question as to the defendant's capacity to waive certain rights. United States v. Silva, 418 F.2d 328 (2d Cir. 1969) (voluntariness of confession); United States v. Plattner, supra, (voluntariness of waiver of counsel); see also People v. Dumas, 51 Misc. 2d 929, 274 N.Y.S. 2d 764 (Sup. Ct. 1966).

The thrust of these cases is clear -- where a defendant's mental condition is placed in issue, any waiver of constitutional rights under the circumstances must be scrutinized with more painstaking care than is customary under the usually brief Rule 11 colloquy. Even where a defendant may not be legally incompetent, he may be sufficiently mentally impaired to require greater inquiry by the district court.

The application of the above principles to appellant's situation compels the inference that the District Court failed to comply with the spirit of Rule 11, Fed. R. Crim. P., which requires that the court investigate the voluntariness and state of mind of the defendant at the time of his plea.

At the time of plea, the District Court was promptly put on notice by defense counsel that there was a question as to appellant's mental competence. The District Judge quite properly granted counsel's request for a psychiatric examination at that time. Inexplicably, however, the District Judge made no further inquiry of counsel or appellant to determine whether the guilty plea was voluntary or whether it should, in fact, be rescinded.

At the time of sentence, new counsel immediately informed the District Judge of his client's "incoherence" and his inability to communicate, and requested a psychiatric examination pursuant to 18 U.S.C. §4208 (b) (pre-sentence commitment for study and evaluation). While the more appropriate course would have been for counsel to renew the application for a competency examination (18 U.S.C. §4244), the message to the District Court was clear -- petitioner's mental condition was seriously in question. Further judicial inquiry as to voluntariness should have been made precisely at that juncture of the proceedings.

It is manifest that, by failing to make any further inquiry beyond three perfunctory questions in assessing voluntariness, even after counsel had placed appellant's mental condition squarely in issue, the District Court violated the spirit of Rule 11. The plea should be vacated thereupon.

B. The District Judge's Failure to Allow Proper Psychiatric Inquiry Denied Appellant Due Process

The District Court's failure to order a psychiatric examination of appellant despite the insistent requests by counsel and the substantial evidence of mental illness and drug abuse that appeared in the record constituted an abuse of the Court's discretion.

Examinations concerning competency to stand trial are governed by 18 U.S.C. §4244, which requires of the federal courts what Pate v. Robinson, supra, requires of the state courts: an inquiry into the defendant's competency whenever it becomes manifest that there is reasonable cause to believe the defendant is incompetent. In the federal courts, the statute provides

that the first step in this inquiry is an examination of the defendant by a psychiatrist. United States v. Marshall, 458 F.2d 446, 450 (2d Cir. 1972).

Where the issue is raised by either the United States Attorney, defense counsel, or the court, sua sponte, a psychiatrist is appointed by order of the court to examine the accused. If that psychiatrist is of the opinion that the defendant is incompetent, a hearing is mandatory. If the psychiatrist finds the defendant competent, a hearing is not required, but is permitted in the exercise of the district court's discretion. 18 U.S.C. §4244. United States v. Polisi, 514 F.2d 977, 980 (2d Cir. 1975); United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1100 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973); United States v. Marshall, supra; United States v. Knohl, 379 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973 (1967); cf. United States v. Makris, 483 F.2d 1082, 1091 (5th Cir. 1973).

This procedural scheme contemplates that the determination of competency be made by the district court only after it has had the benefit of a psychiatric report on the accused's mental condition and, if necessary, an evidentiary hearing, unless of course, it appears that a motion for an examination is not founded upon reasonable cause and therefore is frivolous and not made in good faith. Rose v. United States, 513 F.2d 1251, 1255-1256 (8th Cir. 1975); United States v. Hall, ___ F.2d ___, No. 74-1938 (2d Cir. June 24, 1975); United States v. Taylor,

437 F.2d 371 (4th Cir. 1971) (Sobeloff, dissenting).

As opposed to the requirements for a hearing, the quantum of proof needed to secure examination is of a much lesser stringency. Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); deKaplany v. McCarthy, "503 F.2d 1041"* (9th Cir. 1974), rehearing enbanc granted, 73-2955 (9th Cir., February 14, 1975); Sailer v. Gunn, 387 F.Supp. 1367, 1372 (C.D. Cal. 1974).

It is manifest that, when a motion is made under 18 U.S.C. §4244 which is neither frivolous nor lacking in good faith, and which sets forth grounds constituting reasonable cause to believe that the accused may be presently so incompetent as to be unable to understand the proceedings against him or in properly assisting in his own defense, then the Court is under a mandatory duty to grant such an examination. United States v. McEachern, 465 F.2d 833, 837 (5th Cir.), cert. denied, 409 U.S. 1043 (1972) (and cases cited therein); United States v. Pogany, 465 F.2d 72, 77 (3d Cir. 1972); United States v. Irvin, 450 F.2d 968, 970 (9th Cir. 1971); Rose v. United States, 513 F.2d 1251, 1255 (8th Cir. 1975).

Furthermore, even where the District Court is disinclined to grant outright a request for a psychiatric examination, the court may hold a preliminary hearing before acting upon the request for a §4244 examination, in order to determine

---

* Opinion withdrawn after initial publication.

if the request shows reasonable cause or if the grounds upon which the request is based are frivolous. United States v. Varner, 467 F.2d, 659, 661 (5th Cir. 1972); United States v. McEachern, supra, 465 F.2d at 837. Nevertheless, this preliminary hearing is not to become a preliminary determination of competency itself. Rose v. United States, supra, 513 F.2d at 1255 n.4.

Certainly, counsel's informal motion for examination at plea, which was renewed at sentence, and his clear allegation of his client's "incoherence", coupled with notice of appellant's background contained in the presentence report, constituted more than sufficient "reasonable cause" to warrant further inquiry by the District Judge.

It is significant and probative that appellant's respective lawyers at plea and sentence both requested psychiatric examinations. Certainly the opinion of counsel in closest contact with appellant is not to be lightly cast aside. United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2d Cir.), cert. denied, 408 U.S. 927 (1972). Indeed, as Chief Justice Burger commented:

> "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, see United States ex rel. Rizzi v. Follette, 367 F.2d 559, 561 (CA2 1966), an expressed doubt in that regard by one with "the closest contact with the defendant," (citation omitted), is unquestionably a factor which should be considered."
>
> Drope v. Missouri, supra, 420 U.S. at 177 n.13

The failure of appellant's counsel to file a written order for a psychiatric examination after plea may not be deemed a waiver and cannot absolve the District Court of its responsibility to make its own inquiry. 18 U.S.C. §4244 cannot be construed to require a formal written motion. Such a construction would be plainly inconsistent with the mandatory requirement that the trial judge order a psychiatric examination on his own motion wherever there appears "reasonable cause" to support a belief of possible incompetency. United States v. Irvin, supra, 450 F.2d at 970. Furthermore, the District Judge is under a continuing obligation to inquire anew into the psychiatric condition of the accused in order to be ever on the alert for changed circumstances which would render a once competent defendant incompetent at a later stage of the proceeding. Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966); Drope v. Missouri, supra, 420 U.S. at 181.

The request by counsel at sentence for a §4208(b), rather than a §4244, examination does not vitiate the responsibility of the trial judge to make his own independent inquiry into the defendant's mental state. This Court has considered analogous issues in United States v. Polisi, supra, which held that an examination conducted in aid of sentencing, pursuant to §4208(b) is not ordinarily a substitute for a competency examination. The matter was thereupon remanded for either an evidentiary hearing or a §4244 examination.

That conclusion should point to the resolution of the instant case. Whichever examination was asked for, rightly or wrongly, counsel made plain that psychiatric evaluation of some type was necessary, alleging that his client was presently incoherent, had a history of suicide attempts, and was a narcotics addict. On the basis of all of this evidence, there was more than ample basis to compel the District Judge, who had sufficient "reasonable cause", to make further inquiry into the appellant's mental state. Failure to do so was a clear deprivation of appellant's right to due process of law.

POINT II

THE DISTRICT COURT IMPROPERLY DENIED AN EVIDENTIARY HEARING IN THE §2255 PROCEEDING BELOW

The District Court improperly denied appellant an evidentiary hearing in the §2255 proceeding below where the appellant raised detailed factual allegation not controverted by the files and records of the case, and particularly where the Government, by its resort to a request for psychiatric examination, implicitly asked the Court to consider matters *dehors* the record in making its resolution of the question.

28 U.S.C. §2255 provides, in pertinent part:

> ...Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto... 28 U.S.C. §2255

An evidentiary hearing is required in a §2255 proceeding unless the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous, Sanders v. United States, supra, Townsend v. Sain, 372 U.S. 293 (1963); Machibroda v. United States, supra, 368 U.S. at 494; United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970).

Certainly, the claims of appellant are not insufficient in law. It is manifest that the issue of mental incompetency at the time of trial (or plea) and sentencing can be challenged by a motion under 28 U.S.C. §2255. Bishop v. United States, supra; Sanders v. United States, supra; United States v. Miranda, 437 F.2d 1255 (2d Cir. 1971); O'Neil v. United States, 486 F.2d 1034 (2d Cir. 1973); United States v. Malcolm, supra; Rose v. United States, supra.

Similarly, whatever doubt may have existed at one time as to the propriety of attacking statutory violations of 18 U.S.C. §4244 by means of collateral attack, compare Floyd v. United States, 365 F.2d 368, 374 (5th Cir. 1966), with Hanson v. United States, 406 F.2d 199 (5th Cir. 1969), has been conclusively resolved in favor of permitting such statutory claims to be asserted in a §2255 proceeding. Davis v. United States, 417 U.S. 333, 342 (1974).

This Circuit has specifically considered the circumstances which compel the district court to hold an evidentiary hearing in order to resolve claims as to mental incompetency, United States v. Miranda, supra, 437 F.2d at 1258, and has ruled that, where the movant has raised detailed and controverted

issues of fact, a hearing will be required. See also Nelms v. United States, 318 F.2d 150, 154 (4th Cir. 1963); United States v. Cannon, 310 F.2d 841 (2d Cir. 1962); Taylor v. United States, 282 F.2d 16 (8th Cir. 1960); O'Neil v. United States, supra; Floyd v. United States, supra.

Moreover, the court has repeatedly reaffirmed its disinclination to sustain summary rejection of petitions for post-conviction relief supported by sufficient allegations, not clearly refuted by the files and records below. Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973); Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974).

Where, as here, the transcripts of plea and sentence affirmatively support appellant's allegations as to the District Court's awareness of his history of mental illness, suicide attempts, and drug abuse; appellant's incoherence at sentencing; and counsel's specific and repeated requests for psychiatric evaluation of appellant at both plea and sentence, it is clear that detailed and controverted questions of facts have been raised, which may not be disposed of in summary fashion.

Furthermore, the Government's suggestion below that the District Court proceed dehors the record by securing a retrospective determination of appellant's competency should have alerted the District Judge to the inappropriateness of attempting to resolve this issue by mere reliance upon the files and records of the case, without resorting to an evidentiary hearing.

While appellant expresses no opinion as to the propriety of the District Judge's denial of the Government's motion, it is clear that, where reliance on matters outside of the record is necessary, an evidentiary hearing is required.

The fact that there may have been facial compliance with the requirements of Rule 11, Fed. R. Crim. P., does not conclusively establish that an evidentiary hearing is inappropriate.

In Fontaine v. United States, 411 U.S. 213 (1973), a case in which a federal prisoner had alleged that his guilty plea had been coerced, the Supreme Court remanded for an evidentiary hearing in spite of the fact that the district court had technically complied with Rule 11 by inquiring into the plea's voluntariness. As the Court noted:

> "the objective of [Rule 11], of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect, nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." [Id., at 215].

Clearly, then, the District Court erred in summarily dismissing the §2255 proceeding without prior resort to an evidentiary hearing. Montgomery v. United States, 469 F.2d 148 (5th Cir. 1972); Bryant v. United States, 468 F.2d 812 (8th Cir. 1972); Nolan v. United States, 466 F.2d 522 (10th Cir. 1972); Young v. United States, 399 F.2d 689 (5th Cir. 1968); Floyd v. United States, supra.

POINT III

THE COURT SHOULD VACATE THE GUILTY PLEA, RATHER THAN ATTEMPT A RETROSPECTIVE DETERMINATION OF COMPETENCY, IN LIGHT OF THE TIME ELAPSED SINCE PLEA AND THE SPARCENESS OF CONTEMPORANEOUS PSYCHIATRIC EVIDENCE

A. The District Court's Failure to Comply with Rule 11, Fed. R. Crim. P., Warrants Vacatur of the Guilty Plea

The District Judge's failure to make any inquiry into the voluntariness of appellant's plea, beyond three perfunctory questions, where the record reflected a history of mental illness, suicide attempt, and drug abuse, and where counsel specifically interposed suggestions of incompetency, warrants vacatur of the plea, for failure to comply substantially with Rule 11, Fed. R. Crim. P.

In McCarthy v. United States, supra, 394 U.S. at 468, the Supreme Court held that, where the district court has failed to comply with the requirements of Rule 11, Fed. R. Crim. P., the "defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew," rather than remanding the case for a hearing on the voluntariness of the plea. See Rizzo v. United States, 516 F.2d 789 (2d Cir. 1975).

Concerning the inappropriateness of remanding for a hearing on voluntariness, the Supreme Court stated:

> Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding "in this highly subjective area." Heiden v. United States, [353 U.S. 53, 55 (1965)]. The Rule "contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset***." Ibid. As the Court of Appeals for the Sixth Circuit explained in discussing what it termed the "persuasive rationale" of Heiden: "When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided***." Waddy v. Heer, 383 F.2d 789, 794 (6th Cir. 1967). There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.
>
> McCarthy v. United States, supra, 394 U.S. at 472 (Emphasis in the original).

Since the record of the plea proceedings in this case establishes that the District Court failed to comply with Rule 11 -- by failure to conclusively establish that appellant was pleading voluntarily with understanding and comprehension of the significance of the waivers he was making -- this Court should vacate his judgment and sentence, with a direction that he be permitted to plead anew. McCarthy v. United States, supra, 394 U.S. at 463-464; Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974).

B. The Guilty Plea Should be Vacated Rather than Remanded for a Retrospective Determination of Competency, Where Three Years have Elapsed Since the Plea and Insufficient Contemporaneous Psychiatric Evidence Exists to Allow for A Meaningful Nunc Pro Tunc Determination

Even if the court does not find the district court's inquiry into the plea's voluntariness to have been a per se

violation of Rule 11, the Court should nevertheless vacate appellant's guilty plea, rather than remand for an evidentiary hearing on appellant's competency. Since no contemporaneous psychiatric evidence exists as to appellant's mental state at the time of plea and three years have elapsed, any such attempted nunc pro tunc determination would be speculative in the extreme.

In each of its three most recent considerations of the question, the Supreme Court has reflected upon the inherent difficulties of making retrospective determinations of competency even under the most favorable circumstances, and has, in each instance, remanded for a new trial if the accused is presently competent. Drope v. Missouri, supra, 420 U.S. at 183; Pate v. Robinson, supra, 383 U.S. at 386 ; Dusky v. United States, supra, 362 U.S. at 402.

Following Dusky's rationale, Judge Weinfeld, in Sullivan v. United States, 205 F.Supp. 545 (S.D.N.Y. 1962), held that judicial failure to determine the accused's competence prior to trial was not "merely a procedural error" which could subsequently be corrected by holding a nunc pro tunc hearing, but rather, an error which required vacatur of the conviction without hearing:

> When the statute is properly invoked upon compelling facts as in the instant case, an accused has a substantial right to have the issue of his mental competency to stand trial determined in accordance with the procedure therein provided; he is entitled to a contemporaneous determination which normally affords greater accuracy of judgment than one made years after the event.
>
> Id. 205 F. Supp. at 550 (Emphasis added)

The obstacles to a retrospective determination of competency in this case are well-nigh insuperable. The plea and sentencing occurred three years ago, and moreover, there are no contemporaneous psychiatric records, examinations, or inquiries by the District Court which could be utilized in attempting to reconstruct appellant's psychiatric condition at the time of plea and sentence. Cf., United States ex rel. Suggs. v. LaVallee 390 F.Supp. 383 (S.D.N.Y.), remanded, _____ F.2d _____, No. 75-2049 (2d Cir. August 7, 1975).

Under similar circumstances, in Holloway v. United States, 343 F.2d 265, 267 (D.C. Cir. 1964), Judge Bazelon vacated a judgment of conviction and remanded for a new trial, based upon the district court's improper denial of a pre-trial motion for psychiatric examination, stating that where as here, the accused had had no prior psychiatric examination at all and where there were no psychiatric records and recollections contemporaneous with the trial, a nunc pro tunc hearing and examination would be an exercise in futility.

Indeed, in this Circuit's most recent consideration of this troublesome problem, the Court sustained the district court's retrospective finding of competence, after hearing, only because there was substantial independent expert testimony, consisting of psychiatric evaluations based upon contemporaneous examinations of the petitioner at the time of trial, as well as a contemporaneous judicial finding of competence on an unrelated charge. United States ex rel, Putnom v. Henderson, ____ Fd. _____

No. 74-2586 (2d Cir. August 19, 1975); United States ex rel Suggs v. LaVallee, supra.

There are no similar contemporaneous examinations or findings as to appellant's psychiatric condition, and the time elapsed is now fully three years.

Indeed, it is significant that the overwhelming tendency of the various circuits has been to vacate convictions, rather than to attempt speculative retrospective examinations. Rand v. Swenson, 501 F.2d 394 (8th Cir. 1974); United States v. Roca-Alvarez, 451 F.2d 843 (5th Cir. 1971), rehearing granted, 474 F.2d 1274 (5th Cir. 1973); Morris v. United States, 414 F.2d 258 (9th Cir. 1969); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); United States v. David, supra; Tillery v. Eyman, supra; United States v. Pogany, supra, Moore v. United States, supra; United States v. Irvin, supra; Hansford v. United States, supra.

Given the inherent difficulties in retrospectively determining appellant's competency three years ago, the lack of any contemporaneous psychiatric record upon which to attempt such a determination, the substantial claims of mental illness, suicide attempts and drug abuse on the record, the repeated requests for examination by counsel, the District Judge's clear abuse of discretion in denying such an evaluation, and the cursory inquiry into voluntariness at the time of plea, the plea should be vacated and the matter remanded to permit appellant to replead, if presently competent.

C. If the Court Chooses to Remand for a Competency Determination, the District Court's Initial Consideration Should be Directed to the Question of the Feasibility of Making Such a Nunc Pro Tunc Determination

If the Court chooses to remand to the District Court for a competency determination, the District Court should be directed to consider initially whether or not it is feasible to conduct an adequate and meaningful hearing nunc pro tunc as to petitioner's mental competence at the time of plea. If the District Court determines that a nunc pro tunc proceeding is not feasible, the Court should be directed to vacate the plea and allow appellant to plead anew. Rose v. United States, supra, 513 F.2d at 1257; United States v. Makris, supra, 483, F.2d at 1092; United States v. McEachern, supra, 465 F.2d at 839; Conner v. Wingo, 429 F.2d 630, 640 (6th Cir. 1970).

CONCLUSION

For the reasons stated above, the application pursuant to 28 U.S.C. §2255 should be granted and the case remanded to the District Court with instructions that appellant's guilty plea be vacated and that he be permitted to plead anew. In the alternative, the case should be remanded to the District Court for a hearing in order to determine the feasibility of a retrospective determination of competency.

Respectfully submitted,

EDWARD M. CHIKOFSKY
Attorney for Appellant
300 Park Avenue
New York, New York 10022
(212) 593-9000

Dated: November 17, 1975

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

JOE STEVENSON SADDLER

Plaintiff

against

UNITED STATES OF AMERICA

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
610 West 143rd Street New York, New York

That on November 17 *19* 75 *deponent served the annexed*
BRIEF FOR APPELLANT
on United States Attorney's Office
attorney(s) for Respondent
in this action at 225 Cadman Plaza East Brooklyn, New York 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 17th
day of November, 1975.

Philip Castellano Jr

PHILIP CASTELLANO JR.
NOTARY PUBLIC, State of New York
No. 30-4504329
Qualified in Nassau County
Cert. filed in New York County
Commission Expires March 30, 1977

Denise Tinsley
The same signed must be printed beneath

DENISE TINSLEY